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**80-1695**

No. ———

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
*Petitioner,*

v.

J. E. PELAEZ DEL CASAL and EASTERN AIR LINES, INC.
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTION PRESENTED

Whether the Court of Appeals erred by holding that the duty of fair representation is violated *per se* in any case where a union, which supplies counsel in grievance proceedings to members and to non-member agency fee payors, fails to provide the same service to a non-member who makes no contributions to its cost.*

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* All parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are listed in the caption of the case in this Court. Eastern Airlines, a defendant below, is listed as a respondent pursuant to Rule 19.6.

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No.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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### OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 634 F.2d 295 and is an Appendix to this Petition (1a, *et seq.*)

### JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on January 16, 1981. A timely petition for rehearing *en banc* was denied on February 18, 1981 (16a). By Order of March 11, 1981, the Court of Appeals stayed issuance of its mandate to and including April 10, 1981 to allow filing of a petition for writ of certiorari (18a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

The duty of fair representation arises from a union's exclusive representational status under § 2 Fourth of the Railway Labor Act, 45 U.S.C. 152 Fourth, which provides in pertinent part as follows:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . ."

## STATEMENT OF THE CASE

Petitioner Air Line Pilots Association (ALPA) is the exclusive bargaining representative of air line pilots employed by Eastern Airlines, Inc. Respondent Del Casal was employed, through the time of his discharge, by Eastern under a collective bargaining agreement between ALPA and Eastern. That agreement did not include a union security provision and Del Casal was not a dues-paying ALPA member; nor did he pay equivalent agency fees for ALPA's bargaining services.[1] Respondent was discharged May 29, 1975 on the ground that he was an incompetent and unsafe pilot (2a).[2] Del Casal filed a grievance pursuant to the collective bargaining agree-

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[1] Under the Railway Labor Act, union security provisions requiring payment of dues or equivalent agency fees as a condition of continuing employment were specifically sanctioned by the 1951 amendment to § 2 Eleventh, 45 U.S.C. 152 Eleventh, *Railway Emp. Dept.* v. *Hanson*, 351 U.S. 225 (1956).

[2] Twice prior to his discharge, Del Casal had sought to become an ALPA member but was rejected because the member-pilots who had flown with him considered him incompetent as a pilot. Pursuant to an independent and unrelated examination by Eastern management officials of Del Casal's proficiency, Eastern determined that he was not a competent pilot and terminated his employment.

ment. The grievance was rejected at the initial stages after which ALPA—at Del Casal's request—submitted it for a hearing before the Eastern Airlines Pilots Systems Board of Adjustment (System Board).[3]

ALPA furnishes a staff attorney to those airline employees in System Board arbitration proceedings who are dues-paying members and also to those non-members who pay equivalent agency fees for ALPA's services (R. 127, Exh. 28) (references are to the docket entry numbers on the district court's docket sheet). As stated above, Del Casal was not a member of ALPA nor did he pay agency fees. ALPA staff attorney, John Loomos, assisted Del Casal at the initial stages of his grievance; after perfecting Del Casal's appeal to the final step of the grievance procedure, Loomos advised Del Casal that, because of ALPA's policy, he would be unable to represent Del Casal at the System Board hearing. Pursuant to Loomos' advice, Del Casal retained David Block, Esq. who represented him at the System Board hearing (3a).[4]

The Board, after extensive evidentiary proceedings, sustained Del Casal's termination, unanimously concluding that Eastern's decision was based upon just cause (4a). Del Casal thereafter brought suit against Eastern and ALPA seeking as against Eastern to set aside the

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[3] The system board, composed of two members from Eastern and two members from ALPA is an arbitration tribunal established pursuant to the Railway Labor Act, 45 U.S.C. 184, and the collective bargaining agreement between Eastern and ALPA.

[4] The record shows that not only did Loomos aid Del Casal at the initial stages of his grievance, but also that he attempted to appear at the System Board hearings in order to assist, but was excluded by Block (R. 142: Lehman Dep. at 14-20, 23; Cochran Dep. at 10-13). Indeed, the record shows that Loomos provided Block with copies of pertinent documents, including prior Board awards and opinions, did attend the first hearing as an observer, and assisted Block in every way requested (R. 82, Loomos Dep. at p. 75; R. 78, Plaintiff's Answers to ALPA's Interrogatories, ¶¶ 5, 7).

decision of the System Board and from ALPA to recover attorney's fees incurred by him in unsuccessful pursuit of his grievance as a consequence of ALPA's refusal to furnish staff counsel. The district court held that ALPA's refusal to provide Del Casal with staff counsel breached its duty of fair representation and entered judgment of $35,000 against ALPA for Del Casal's attorney's fees. The district court at the same time rejected Del Casal's claim against Eastern holding that the System Board decision was final and binding and that the fairness of the proceeding had not been affected by ALPA's refusal of staff counsel.

The Court of Appeals, concluding that Del Casal's grievance had been properly rejected, affirmed dismissal of Del Casal's claim against Eastern. It observed that Del Casal had been represented by retained counsel throughout the arbitration process and that there was "no claim that a union attorney could have adduced additional evidence in [his] favor." (8a). At the same time, the Court of Appeals affirmed the judgment against ALPA, holding that ALPA had breached its duty of fair representation by refusing Loomos a staff attorney at the System Board hearing. The Court of Appeals concluded as follows:

> "The record shows that ALPA does provide attorneys to grievants at their hearings before the System Board. It is also clear from the record that John Loomos, the ALPA staff attorney, would have represented Del Casal but for the fact that he was not a union member. While ALPA has the authority to decide under what conditions an attorney will be supplied to a grievant, the fact that the grievant is not a member of the union can play no part in that decision." (11a).

Even though it found that Del Casal's underlying grievance was lacking in merit, the Fifth Circuit nevertheless affirmed the $35,000 judgment against ALPA.

## REASONS FOR GRANTING THE WRIT

### THE FURNISHING OF STAFF COUNSEL FOR ARBITRATION PROCEEDINGS AS AN INCIDENT OF UNION MEMBERSHIP TO INDIVIDUALS WHO PAY MEMBERSHIP DUES OR EQUIVALENT SERVICE CHARGES IS A REASONABLE ALLOCATION OF LIMITED UNION RESOURCES AND DOES NOT VIOLATE THE DUTY OF FAIR REPRESENTATION AS PREVIOUSLY ARTICULATED BY THIS COURT AND OTHER COURTS OF APPEALS.

The Fifth Circuit's decision in this case, holding ALPA's policy for furnishing staff counsel in violation of the duty of fair representation, establishes a *per se* rule that unions which furnish counsel to dues-paying members and to agency fee payors must provide the same service to non-members who pay no part of the cost of the service. Under the Fifth Circuit's rule, a union failing to provide counsel faces liability for fee obligations incurred by the non-member to individually-retained counsel, even if the non-member's underlying grievance against the employer is determined to be without merit. This decision represents an unprecedented expansion of the fair representation duty with substantial implications not only for ALPA but for other unions who provide counsel for those individuals who contribute to the cost of the service.

#### A. The Fifth Circuit's decision is contrary to decisions of this Court which have defined DFR's scope and purpose as the protection of employment status and have reserved broad discretion to the union in the exercise of its exclusive representative authority.

The fair representation duty's sole aim has previously been to protect employees represented by an exclusive bargaining agent *from harm to their employment rights* through arbitrary exercises of the representative's exclusive authority, *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345

U.S. 330 (1953). The duty has been declared "equal in scope" with the union's exclusive authority and "correlative" thereto, *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964); *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 564 (1976); *Int'l Bhd. of Electrical Workers* v. *Foust*, 442 U.S. 52, —— (1979).[5] In exercising its exclusive authority, the union has heretofore enjoyed a "wide range of reasonableness", *Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. at 338, which includes broad discretion in its administration of contract grievance and arbitration procedures, *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967).

Until now, it has been implicit that the fair representation duty is violated only where arbitrary exercise of the union's exclusive authority *jeopardizes some aspect of the employment status of the persons represented*, which the Court of Appeals acknowledged did not occur here. In the arbitration context, this Court has held the duty violated where a union "arbitrarily ignore[s] a meritorious grievance or process[es] it in a perfunctory fashion" *id.* at 191. Absent jeopardy to a person's employment status through the thwarting of a meritorious grievance, a union's grievance administration policies are within the area of discretion protected by *Huffman* and *Vaca*. Here, ALPA placed Del Casal's grievance before the System Board precisely as asked. As stated in *Hines*, where ". . . the union actually utilizes the grievance and arbitration procedures in behalf of the employee, *the focus is . . . on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous out-*

[5] The duty accordingly has not been held to extend to a union's conduct and policies outside the realm of its exclusive agency function, *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, n. 20 (1971); *Kuhn* v. *Nat. Ass'n of Letter Carriers*, 528 F.2d 767, 770 (C.A. 8, 1976); *Archer* v. *Air Line Pilots Ass'n*, 609 F.2d 934, 939 (C.A. 9, 1979), *cert. denied*, 100 S.Ct. 2920.

*come of the contractual proceedings.*" 424 U.S. at 568 (Emphasis added).

By holding the DFR violated where the union's conduct in no way jeopardizes any aspect of employment—indeed even where the underlying grievance is specifically found to be lacking in merit—the newly-declared *per se* rule violates the "focus" mandated by *Hines* and conflicts also with *Huffman* and *Vaca*. It conflicts further with this Courts' recent holding in *Foust, supra,* disallowing punitive damage awards as inconsistent with the duty's compensatory objective. If the duty seeks only to compensate an employee for improper harm to his employment status attributable to his union's abuse of its exclusive authority, it allows no compensation as a threshold matter to a person whose employment rights have not even been violated. Absent improper harm attributable to union misconduct, there is no cognizable harm to compensate. In such a context, a damage award against the union is necessarily punitive contrary to *Foust*.[6]

Here, ALPA neither foreclosed arbitration of Del Casal's grievance nor thwarted its success by perfunctory handling.[7] That ALPA's conduct in this case in no way

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[6] It is no answer to say that the damage award "compensates" Respondent for his fee obligation to retained counsel since that obligation is in no way a consequence, either direct or indirect, of a violation of Respondent's employment rights. As such, Respondent's fee obligation simply is not harm cognizable by DFR consistent with the prior decisions of this Court. Neither Respondent's discharge nor the denial of counsel violated his employment rights; the discharge was duly upheld and the furnishing of counsel was in no way a term of employment under the applicable labor contract. Absent some contract breach or other improper derogation of employment status, there is nothing for the DFR to compensate, *Vaca, supra,* 386 U.S. at 197-198; *Czosek* v. *O'Mara,* 397 U.S. 25, 29 (1970); *Hines, supra.*

[7] Rather than arbitrarily foreclosing arbitration of nonmembers' grievances, see *Hughes Tool Co.* v. *NLRB,* 147 F.2d 69 (C.A. 5, 1945), ALPA placed Del Casal's grievance before the System

jeopardized Del Casal's employment status is beyond dispute and indeed was acknowledged by the Fifth Circuit's affirmance of the judgment upholding the integrity of the System Board proceeding. Had the Fifth Circuit properly conceived the scope and purpose of the fair representation duty, it would have recognized that furnishing or denial of staff counsel does not by itself implicate the duty's concern so long as union action or inaction does not thwart a meritorious grievance and in no way jeopardize rights of employment. Further, had the Fifth Circuit properly respected the "wide range of reasonableness" and "substantial discretion" reserved to the union it would have recognized ALPA's policy of furnishing staff counsel's service to employees who share in its cost through membership dues or agency fee-service charges—and withholding such service from "free riders" —as a reasonable allocation of limited union resources and a clearly proper exercise of discretion. Denial of an expensive service to free-riders, so long as employment status is not jeopardized in the process, harmonizes perfectly with a principal objective of Congress' 1951 Amendment of the Railway Labor Act, namely:

> the elimination of the 'free riders'—those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions." See *Int'l Assn. of Machinists* v. *Street*, 367 U.S. 740, 761 (1961); *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41 (1954).

The Fifth Circuit's decision is wholly oblivious to the Railway Labor Act policy of discouraging free riders. The fact that ALPA's policy denies counsel to those who pay no share of the cost rather than suggesting breach of the fair representation duty accentuates the policy's reasonableness.

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Board thus fully satisfying whatever interest he had under the collective bargaining agreement in receiving a full and fair hearing of his grievance.

Since application of ALPA's staff counsel policy was in no way responsible for Respondent's loss of employment, the Fifth Circuit's *per se* rule holding it in violation of the DFR conflicts with this Court's decisions in *Vaca*, *Hines*, *Huffman*, and *Foust*.

**B. The Fifth Circuit's decision conflicts with decisions of other courts of appeals holding that unions may distinguish between members and non-members in the conferral of internal union benefits and with decisions holding that DFR does not require the union to furnish the grievant with counsel.**

The Fifth Circuit paid lip service to, but failed to accept the inevitable application of, (1) decisions of other courts of appeals allowing unions to distinguish between members and non-members with respect to internal union benefits, and (2) decisions holding that the duty of fair representation does not require the union to furnish the grievant with counsel. The Fifth Circuit's decision is contrary to these lines of authority. Once the union has exercised its prerogative of invoking arbitration, its policy with respect to furnishing the grievant with counsel—like other internal benefits of union membership, eligibility to participate in union decision-making processes, and eligibility for membership itself—does not threaten derogation of employment status through preclusion of a meritorious grievance or otherwise.

It is settled that the fair representation duty does not require a union to accept any particular individual into membership, *Moynahan* v. *Pari-Mutuel Employees Guild*, 317 F.2d 209, 211 (C.A. 9, 1963). As this Court declared in *Steele* itself, while the union is obliged fairly to protect the employment status of all employees, the Railway Labor Act "does not deny to such a bargaining labor organization the right to determine eligibility to its membership. . . ." 323 U.S. at 204; *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 184

(1967). Similarly foreign to exercise of the exclusive agency are a union's policies with respect to eligibility for internal benefits. A union is not obliged to extend to non-members the same insurance or other internal benefits that are enjoyed by members. *NLRB* v. *Automobile Workers*, 222 F.2d 95 (C.A. 7, 1955). Non-members may lawfully be charged a cost-based fee for the privilege of using a hiring hall which members fund through their normal dues, *Local 138, Operating Engineers* v. *NLRB*, 321 F.2d 130, 135, 138-39 (C.A. 2, 1963). The very right to vote on whether or not to ratify a proposed bargaining agreement can be lawfully confined by a union to those employees in the bargaining unit who are members in good standing. *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 737 (1963); *Cleveland Orchestra Committee* v. *Musicians, Local 4*, 303 F.2d 229 (C.A. 6, 1962); *Werk* v. *Armco Steel Corp.*, —— F. Supp. ——, 92 LRRM 3393 (S.D. Ohio 1976). The *per se* rule declared by the Fifth Circuit in this case conflicts with the foregoing decisions. ALPA's staff counsel policy—just as much as the internal union benefits and rights involves in those cases—is outside the concern of the DFR so long as the employment status of persons represented is in no way jeopardized by its application.

Until now, no court had held the fair representation duty, in any circumstance, to require a union to furnish counsel for an arbitration proceeding. Indeed, all courts of appeals addressing the question had held that the duty does not require counsel to be furnished, *D'Elia* v. *N.Y., N.H., & H.R.R. Co.*, 230 F.Supp. 912 (D. Conn., 1964), *aff'd* 338 F.2d 701 (C.A. 2, 1964), *cert. denied*, 380 U.S. 978; *Golden* v. *Local 55, Firefighters*, —— F.2d ——, 24 FEP Cases 1340, 1342 (C.A. 9, 1980).[8] Underlying those decisions is recognition that furnishing or

[8] The Fifth Circuit itself had held that furnishing of union counsel is not required by the duty of fair representation, *Grovner* v. *Georgia-Pacific Corp.*, 625 F.2d 1289 (C.A. 5, 1980).

denial of counsel will not by itself, unlike union refusal to invoke arbitration procedures or perfunctory grievance handling, jeopardize employment status by thwarting meritorious grievances.

If furnishing of counsel is not as a general matter required—and the Second and Ninth Circuits have held along with the Fifth Circuit in *Grovner, supra*, that it is not—then it follows *a fortiori* that a policy limiting staff counsel to those paying their fair share of the cost is a reasonable union policy consistent with the fair representation duty. ALPA's policy rather than invidiously discriminating against non-members,[9] simply limits an expensive internal benefit, which unions are not as a general matter required to provide in order to fulfill the duty, to those individuals who pay their fair share of its cost.

As such, ALPA's policy is squarely in line with the contemplation expressed by this Court in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), that participation in union decision-making be limited to union members and that enjoyment of union-funded internal benefits, such as representation by staff counsel here, would be limited to those contributing to the cost. In describing an arrangement under which employees would pay agency fees but could, if they wished, refrain from becoming union members, the Court stated as follows:

> "Employees choosing not to join would make the required payments and, in accordance with union custom, would share in union expenditures for strike benefits, educational and retired member benefits, and union publications and promotional activities, but they would not be entitled to attend union meetings, vote upon ratification of agreements negotiated by the union, or have a voice in the internal affairs of the union." 373 U.S. at 737.

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[9] Notably, ALPA does not deny counsel to all non-members since it provides counsel to those non-members who pay service charges.

ALPA's policy of furnishing counsel as an incident of membership to employees paying membership dues or equivalent service charges is precisely the practice which the Court accepted as customary and contemplated with respect to the broad range of union-funded internal benefits. Such a practice indeed advances the policy of the Railway Labor Act of eliminating "free riders".

Here, as surely as in any case, there has been no frustration of a meritorious grievance whether through preclusion or mishandling of the arbitration remedy, or otherwise. The System Board, after a full and fair hearing in which Del Casal was represented by his own counsel, upheld Eastern's conclusion that Del Casal was not a competent pilot. The integrity of that determination was upheld by judgment of the district court which was affirmed by the Court of Appeals. If ALPA had simply refused Del Casal's request to place his grievance before the System Board and Del Casal had asserted such refusal as a violation of DFR, ALPA could have defended by demonstrating that the grievance was without merit, which is precisely what the System Board duly concluded after a full and fair hearing. In this case, given his grievance's lack of merit, the full and fair hearing which Del Casal received before the System Board appears in retrospect as more than he could have commanded pursuant to the duty of fair representation. Since the sustaining of his discharge was due to his lack of competency as a pilot and his grievance's lack of merit —and not to the denial of counsel or any other conduct of ALPA—no breach of the fair representation duty can be held to have occurred.

* * * *

The Court of Appeals' *per se* rule that unions which provide counsel to grievants in arbitration proceedings must provide this expensive service without regard to whether the particular grievant shares in the cost (1) violates the broad discretion reserved to unions by the

decisions of this Court in *Huffman* and *Vaca*; (2) extends the duty of fair representation in violation of *Vaca* and *Hines* to a union policy which does not threaten harm to the grievant's employment status and, at any rate, manifestly did not harm Del Casal's employment status in this case; (3) disapproves a reasonable union policy in harmony with the Railway Labor Act policy of discouraging "free riders"; and (4) in conflict with *Foust*, upholds a damage remedy where the grievant has suffered no violation of his employment rights and accordingly has no claim cognizable, nor compensable, by the DFR.

The Fifth Circuit's decision in this case will have far-reaching implications for application of the duty of fair representation under both the Railway Labor Act and the Labor-Management Relations Act. The decision passes on a highly significant issue of federal labor law not directly resolved by this Court which fully warrants this Court's review.

## CONCLUSION

For the reasons stated, the Petition for Writ of Certorari should be granted; the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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# APPENDIX

## APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNIT B

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Nos. 79-1880, 79-2953

J. E. PELAEZ DEL CASAL,
*Plaintiff-Appellant,*

v.

EASTERN AIRLINES, INC., ET AL.,
*Defendants,*

EASTERN AIRLINES, INC.,
*Defendant-Appellee.*

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J. E. PELAEZ DEL CASAL,
*Plaintiff-Appellee,*

v.

EASTERN AIRLINES, INC., ET AL.,
*Defendants,*

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
a labor organization,
*Defendant-Appellant.*

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Jan. 16, 1981

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Appeals from the United States District Court
for the Southern District of Florida

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Before KRAVITCH and FRANK M. JOHNSON, JR., Circuit Judge, and ALLGOOD*, District Judge.

ALLGOOD, District Judge:

This is a consolidated appeal from the district court's orders in two separate actions resulting from the same facts. In the first case (79-1880) J. E. Pelaez Del Casal appeals from an adverse summary judgment in favor of defendant, Eastern Airlines, relative to the alleged wrongful discharge of appellant as an airline pilot for Eastern. The second case (79-2953) is before the court upon the appeal by the Airline Pilots Association, International (ALPA) from the district court's order granting Del Casal's motion for summary judgment as to liability for the breach of the duty of fair representation and from the district court's orders entering judgment against ALPA in the amount of $35,000 damages and denying a motion for judgment notwithstanding the verdict, or for a new trial, or for remittitur.

I. Facts

Appellant Del Casal was a pilot employed by Eastern Airlines. While employed by Eastern, Del Casal twice unsuccessfully attempted to become a member of ALPA, the exclusive bargaining agent for Eastern's pilots. Both times he was rejected on the basis of his incompetency as a pilot.

On May 29, 1975, Del Casal was discharged from Eastern on the ground that he was an incompetent and unsafe pilot. He immediately filed a grievance pursuant to the collective bargaining agreement between ALPA and Eastern. During the initial stages of the grievance procedure, Del Casal was assisted by John Loomos, an ALPA staff attorney. When the grievance was rejected at the initial stages, Del Casal requested a hearing be-

* Senior District Judge of the Northern District of Alabama, sitting by designation.

fore the Eastern Airlines Pilots System Board of Adjustment (System Board). The System Board, composed of two members from Eastern and two members from ALPA, is an arbitration tribunal established pursuant to the Railway Labor Act, 45 U.S.C. § 184 and the collective bargaining agreement between Eastern and ALPA.[1]

Before the System Board hearing was held, Loomos, the ALPA staff attorney, advised Del Casal that he would not be allowed to represent him at the hearings. ALPA had instructed Loomos to cease handling the case because Del Casal was not a member of the union. In his letter to the appellant informing him that he would no longer be representing him because he was not a union member, Loomos advised Del Casal to retain the services of another attorney. Del Casal took this advice and retained an attorney, David Block, to represent him in the matter.

A four member System Board was convened to consider Del Casal's grievance and his attorney presented a motion based on procedural defects of the discharge.[2] The four member board deadlocked on this issue and, pursuant to the collective bargaining agreement, a fifth neutral member, selected from a list of experienced arbitrators, was added to the board in order to break the deadlock. The five member board met in closed executive session and the deadlock was broken in Del Casal's favor. The board ruled that Eastern could not use evidence which did not comply with the collective bargaining agreement to support Del Casal's discharge.

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[1] The major provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, are applicable to carriers by air. *See* 45 U.S.C. § 181 *et seq.*

[2] The motion contended that Eastern's discharge of Del Casal was wrongful since it was based upon evidence violative of Section 41 of the collective bargaining agreement. Section 41 prohibits the use of disciplinary letters over three years old or letters based upon dissimilar infractions.

Thereafter, the four member board reconvened on September 15, 1976, and on January 11-13, 1977, to determine whether Eastern was justified in terminating Del Casal. Del Casal was represented by retained counsel Block throughout the proceedings. On February 7, 1977, the System Board issued a ruling finding that Eastern was justified in terminating Del Casal.

Subsequently, Del Casal instituted an action seeking to set aside the decision of the System Board and to be granted a *de novo* review of his claim of wrongful discharge. The thrust of his complaint was that his hearing before the System Board was a sham and a mockery of justice because all of the board members were biased against him. A claim was also presented against ALPA for monetary damages resulting from ALPA's alleged breach of its duty of fair representation. The district court granted appellant's motion for summary judgment against ALPA as to liability for the breach of the duty to fairly represent Del Casal and agreed that ALPA had breached that duty by not providing him with an attorney. The court explained that Del Casal was entitled to recover attorney's fees actually paid to his privately retained attorney as well as any other expenses incurred as a direct and proximate result of having to retain private counsel. *Del Casal* v. *Eastern Airlines, Inc.*, 465 F.Supp. 1254 (S.D. Fla. 1979). The cause was set for trial as to these damages. The district court granted Eastern's motion for summary judgment against Del Casal on his claim for wrongful discharge and found that, although ALPA had breached its duty of fair representation to Del Casal, the court did not have jurisdiction over Eastern because the breach of duty did not "substantially undermine" the integrity of the System Board. Thus the district court held that the System Board decision was final and binding on Del Casal and Eastern was dismissed as a party defendant. *Id.* Del Casal's appeal of that part of the court's order which

dismissed Eastern as a defendant is the subject of the first case (No. 79-1880) of this consolidated appeal. Subsequently, a trial was held to determine damages due Del Casal and the jury returned a verdict of $35,000 against ALPA. The district court entered judgment in that amount with interest thereon and costs and also denied ALPA's motion for judgment N.O.V., or for a new trial, or for remittitur. ALPA's appeal of that part of the district court's order granting Del Casal's motion for summary judgment as to ALPA's liability and from the court's orders entering the $35,000 judgment and denying the above motions is the subject of the second case (No. 79-2953) of this consolidated appeal.

II. Del Casal's Appeal (No. 79-1880)

On appeal, Del Casal contends that the decision of the System Board should be set aside on two grounds: (1) he was denied fundamental due process in that he was not accorded a hearing before an impartial tribunal, and (2) the entire arbitral proceedings were seriously undermined by ALPA's breach of its duty of fair representation. He cites *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976), and *Wells* v. *Southern Airways, Inc.*, 517 F.2d 132 (5th Cir. 1975), *cert. denied*, 425 U.S. 914, 96 S.Ct. 1512, 47 L.Ed. 2d 765 (1976), and *cert. denied Air Line Pilots Asso., International* v. *Wells*, 425 U.S. 1000, 96 S.Ct. 2217, 48 L.Ed.2d 824 (1976), and *later app. Wells* v. *Southern Airways, Inc.*, 616 F.2d 107 (5th Cir. 1980), in support of these contentions. Neither contention is sufficient, on the facts of these cases, to require setting aside the decision of the System Board.

It is well settled that the Railway Labor Act, under which the Eastern Airlines Pilots System Board of Adjustment was created, allows only limited judicial review of arbitration decisions. In fact, its range is among the narrowest known to the law. *Eastern Airlines, Inc.* v.

*Transport Workers Union*, 580 F.2d 169, 172 (5th Cir. 1978); *Diamond* v. *Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970). *See also Andrews* v. *Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 (1972). A court may set aside an order of the System Board only on one of three specific grounds: (1) failure of the System Board to comply with the Act, (2) fraud or corruption, or (3) failure of the order to conform or confine itself to matters within the System Board's jurisdiction. 45 U.S.C. § 153(q).[3] *Eastern Airlines*, 580 F.2d at 172; *Diamond*, 421 F.2d at 233.

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[3] 45 U.S.C. § 153(q) provides:

> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, *or* is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part or remanded to the division, for failure of the division to comply with the requirements of this Act [45 U.S.C. §§ 151 et seq.], for failure of the order to conform, or confine, itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code [28 U.S.C. §§ 1254, 1291].

*Id.*

Although in his original complaint Del Casal made allegations covering these three grounds, in his briefs filed on appeal he specifically states that he does not contend that he fits within these statutory exceptions. Instead, appellant argues a judicially created ground for review and contends that the System Board's order should be set aside because all the members of the arbitral body were biased against him; and he was thus denied fundamental due process. He argues that he could not have a fair hearing before a System Board composed of two company appointed members and two union appointed members. However, he has made no showing of partiality or bias on the part of individual members of the System Board.

This court has previously rejected the contention that a System Board's holding must be set aside because there was no one on the board "partisan" to the employee's interests. In *Wells* v. *Southern Airways, Inc.*, 517 F.2d 132 (5th Cir. 1975), plaintiff Wells, also a pilot, made such an argument and prevailed in the district court. This court reversed, noting that all members of the System Board "are charged with the responsibility of impartially deciding the case before the board. The trial court did not find any bias on the part of individual members of the board. No denial of fundamental due process occurred, making the Board's decision final." *Id.* at 134-35, footnote omitted.

Here, as in *Wells*, the members of the System Board were obligated to determine disputes before it in an independent, impartial manner. Absent a showing of partiality or bias on the part of individual members of the System Board, this court will not disturb its conclusions.

Appellant Del Casal also contends that the union's breach of its duty of fair representation so infects the System Board's proceedings that its conclusions must be set aside. In *Hines*, the Supreme Court held that a

union's breach of its duty of fair representation may invalidate an otherwise binding arbitrated decision if it "seriously undermines the integrity of the arbitral process." 424 U.S. at 567, 96 S.Ct. at 1058. Here, the union's breach of its duty of fair representation, which is discussed further below, did not "seriously undermine" the integrity of the arbitral process in this case.

In *Hines*, the union told claimants that they need not hire counsel because the union would process their grievance. However, at the arbitration hearing the union attorney presented no evidence in favor of the claimants, and the arbitrators ruled against them. After arbitration, claimants retained their own counsel who uncovered evidence which exonerated claimants of the charges upon which their discharges from employment had been based. The Supreme Court's focus in *Hines* was upon the claimant's lack of representation which seriously undermined the arbitral process.

In the instant case, however, appellant was advised to obtain counsel, and he did so. Retained counsel represented appellant throughout the arbitration process. There is no claim that a union attorney could have adduced additional evidence in appellant's favor. Thus, appellant's argument that the union's breach undermined the integrity of the arbitration proceeding is mere conjecture and invalid. The district court was, therefore, correct in concluding that the System Board's order denying relief to appellant Del Casal is final and binding and Eastern was correctly dismissed as a party defendant in this case.

## III. ALPA's Appeal (No. 79-2953)

### A. The Duty of Fair Representation

On appeal, ALPA contends that the district court erred in holding that the union violated its duty of fair representation by refusing to provide Del Casal with a

union staff attorney to represent him at the System Board hearing. ALPA argues that the services of a staff attorney are one of the benefits of union membership and the furnishing of such is not required by contract or law. Furthermore, the union argues that the duty of fair representation does not require a union to accept any particular individual into membership, *Moynahan* v. *Pari-Mutuel Employees Guild of Cal. Local 280*, 317 F.2d 209, 211 (9th Cir. 1963), *cert. denied*, 375 U.S. 911, 84 S.Ct. 207, 11 L.Ed.2d 150 (1963), and that a union is not obliged to extend to nonmembers the same insurance, social, or other internal benefits which are enjoyed by members. *NLRB* v. *International Union, United Auto Workers*, 222 F.2d 95 (7th Cir. 1955). ALPA notes that a union may refuse to prosecute a grievance which it considers to be lacking in merit. *Vaca* v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Sanderson* v. *Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973); *Encina* v. *Tony Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971). Noting also that the district court declined to follow *Encina* because it found that ALPA's refusal to supply a staff attorney was based upon Del Casal's nonmembership, rather than the lack of merit in his grievance, the union argues that Del Casal's nonmembership and the lack of merit in his grievance were only opposite sides of the same coin since Del Casal was refused membership only because of his incompetence as a pilot and that the decision not to supply him with a staff attorney was based on that incompetency.

The court accepts ALPA's arguments that the duty of fair representation does not require a union to accept a particular individual into membership, that a union is not obligated to extend those internal benefits enjoyed by its members to nonmembers, and that a union may refuse to prosecute a grievance which it considers to be lacking in merit; however, these arguments are not dispositive of the issue in this case. The issue in this case is whether

a union may refuse to represent a member of the bargaining unit on the ground that he is not a member of the union without violating its duty of fair representation. Thirty-five years ago this court established the principle that a union may not discriminate against members of its bargaining unit on the basis of that person's status as a nonmember of the union. *Hughes Tool Co.* v. *NLRB*, 147 F.2d 69 (5th Cir. 1945).

The United States Supreme Court noted the exclusive authority of a bargaining agent to represent the interests of all employees without regard to union membership and commented on a union's duty of fair representation in *Hines*, 424 U.S. at 564, 96 S.Ct. at 1056, when it stated that "the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.' " That court had earlier defined the union's duty of fair representation in *Vaca* v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, when it stated that the agent's "statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion in complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177, 87 S.Ct. at 909. The court continued, saying that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916. The proposition that discrimination against nonmember employees who are part of the bargaining unit is impermissibly arbitrary if no relevant distinctions exist between the union and nonunion employees is reiterated in *Deboles* v. *Trans World Airlines, Inc.*, 552 F.2d 1005, 1016 (3rd Cir. 1977), *cert. denied*, 434 U.S. 837, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977).

In the instant case the appellee Del Casal argues that ALPA's discriminatory refusal to allow a staff attorney to represent him at the System Board hearing based upon his nonmember status constituted a breach of ALPA's duty to fairly represent him. We agree. The record shows that ALPA does provide attorneys to grievants at their hearings before the System Board. It is also clear from the record that John Loomos, the ALPA staff attorney, would have represented Del Casal but for the fact that he was not a union member. While ALPA has the authority to decide under what conditions an attorney will be supplied to a grievant, the fact that the grievant is not a member of the union can play no part in that decision.

B. The Damages

Appellant ALPA further contends that Del Casal is not due any damages for the breach of the duty of fair representation and, alternatively, that the damages are excessive. ALPA relies upon the district court's finding that the breach of duty had no prejudicial effect upon the System Board's review and determination of Del Casal's grievance to argue that a monetary award should not be allowed for an employee who, despite the union's breach, has prosecuted his own grievance and received a full and fair hearing. Relying on cases such as *Cronin* v. *Sears, Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978); *Deboles* v. *Trans World Airlines*, 552 F.2d 1005; *St. Clair* v. *Local Union No. 515 of Int. Bro. of Teamsters, Inc.*, 422 F.2d 128, 132 (6th Cir. 1969), ALPA presses the argument that where the grievant would have lost even if there were no breach by the union, an award of damages is not permitted. It is ALPA's position that if the grievance process is untainted by a union's breach, the employee is in the same position he would have been had there been no breach and should not be compensated.

The cases relied upon by ALPA are inapposite and mislead because they hold that if a grievance is meritless, a plaintiff suffers no actual loss because of the union breach. ALPA's argument ignores the fact that the plaintiff here suffered loss in the form of fees to be paid to his privately retained attorney. The applicable law on damages in cases such as this was set forth in *Vaca* v. *Sipes*, 386 U.S. at 197, 87 S.Ct. at 920, when the court stated, "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each." *Id.* Here, the damage caused by the union was the attorney's fee which Del Casal incurred as a result of the union's breach. Judgment was correctly entered against ALPA only for the damage caused by the breach of the duty to fairly represent Del Casal in the System Board hearings.

ALPA argues, alternatively, that the $35,000 awarded by the jury is excessive and that the court erred in refusing to impose a remittitur upon the jury's award. We do not agree. The jury's award was well within the limits of the proof. In order for an award to be reduced, "the verdict must be so gross or inordinately large as to be contrary to right reason." *Machado* v. *States Marine-Isthmian Agency, Inc.*, 411 F.2d 584, 586 (5th Cir. 1969). The court "will not disturb an award unless there is a clear showing that the verdict is excessive as a matter of law." *Anderson* v. *Eagle Motor Lines, Inc.*, 423 F.2d 81, 85 (5th Cir. 1970). The award, in order to be overturned, must be "grossly excessive" or "shocking to the conscience." *LaForest* v. *Autoridad de Las Fuentas Fluviales*, 536 F.2d 443 (1st Cir. 1976). Plaintiff's testimony showed that a reasonable hourly fee for his attorney could have been $75.00 per hour. The testimony showed that the attorney had spent 783 hours in the preparation and trial of the System Board case which dragged on for over a year. While defendant pro-

duced conflicting testimony, the jury's award was well within the evidence presented.

We have considered the other points raised by the appellants and find them to be without merit. Both cases are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 79-2953

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D.C. Docket No. 77-2279-Civ-JAC

J. E. PELAEZ DEL CASAL,
*Plaintiff-Appellee,*

versus

EASTERN AIRLINES, INC., ET AL.,
*Defendants,*

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
a labor organization,
*Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Florida

Before KRAVITCH and FRANK M. JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

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* Senior District Judge of the Northern District of Alabama, sitting by designation.

of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

January 16, 1981

Issued as Mandate: Mar. 3, 1981

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* Senior District Judge of the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

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No. 79-2953

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J. E. PELAEZ DEL CASAL,
*Plaintiff-Appellee,*

versus

EASTERN AIRLINES, INC., ET AL.,
*Defendants,*

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
a labor organization,
*Defendant-Appellant.*

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Appeal from the United States District Court for the
Southern District of Florida

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ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion January 16, 1981,

5 Cir., 198—, —— F.2d ——).

(February 18, 1981)

Before KRAVITCH and FRANK M. JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procdure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

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* Senior District Judge of the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

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No. 79-2953

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J. E. PELAEZ DEL CASAL,
*Plaintiff-Appellee,*

versus

EASTERN AIRLINES, INC., ET AL.,
*Defendants,*

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
a labor organization,
*Defendant-Appellant.*

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Appeal from the United States District Court for the Southern District of Florida

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ORDER:

( ) The motion of appellant, AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of appellant, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, for stay of the issuance of the mandate pending petition for writ

of certiorari is GRANTED to and including April 10, 1981, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue that mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ _____ for a further stay of the issuance of the Mandate is DENIED.

/s/ Phyllis Kravitch
United States Circuit Judge